(Brief recess.)

MR. LING: I had a change to the speaker order. The next speaker will be John Walke, then Lyman Welch.

Go ahead and take your seat, John. We'll wait a couple of more minutes. Then we'll start.

(Pause.)

MR. LING: Not everyone's here, but you can start when you're ready. If you'd like to wait a few more minutes, feel free. But let's just start whenever you're ready.

MR. WALKE: I'm ready. My name is John Walke, Clean Air Director with the Natural Resources Defense Council located here in Washington, D.C.

Just by way of quick background, I started practicing in private practice at a law firm here in Washington in the early 90's and did about three or four years of Title V permitting there for private companies, Fortune 500 companies, mostly preparing applications at that stage because it was the very beginning of the program.

Then I moved to EPA's Office of General

Counsel in 1997, where I was EPA's national Title V attorney from 1997 to 2000 counseling the regions and headquarters on all aspects of the program really.

Then I joined NRDC in 2000 and have been there since.

I want to revisit just a little bit of history to explain how we got where we are from the public's perspective because I think that highlights some of our views of how the program has been carried out and how it's promises have been met in some respects and how its promises have certainly not been met in other respects.

It's fair to remember that Title V in 1992 and the rules that were issued under the first Bush administration were that the air pollution equivalent of NSR under this administration -- it was an extremely contentious process.

And you'll all recall the vice president's council on competitiveness in the Office of Management and Budget, which interfered with EPA's issuance of the rule, leading to Congressional oversight and frankly rules that were not consistent

with the Clean Air Act in 1992.

And litigation resulted. That's the only mention I'll make of the litigation. But in 1994 and 1996 EPA put forward rulemaking proposals to rectify the problems, some of the problems and some of the concerns with the original rules.

Both from industry's perspective and states and environmental group perspectives some 8 to 10 years later it's really quite a scandal that those rule revisions have not been adopted yet.

I think that's one of the reasons we're in a state now that is far from ideal. It's far from what Congress expected.

The environmental petitions who brought those original suits recently moved to reopen that original lawsuit out of frustration that the rules had not been finalized at this late date -- and seeing no prospect of that being done.

I think it's fair for this Task Force to understand that only then was an idea of a Title V Task Force floated. I think it occurred to us and many others that this was quite obviously a blocking

move to prevent adoption of those final rules or a reopening of the lawsuit.

So I just wanted to present that alternative picture while at the same time eagerly participating in good faith before a group of other people who are also participating in good faith.

But fundamentally there are just some irreconcilable conflicts at the heart of what people think Title V is to accomplish and that is embodied in the original 1992 rules, the '94 and '96 proposals and the lawsuit over the original rule.

It's my respectful suggestion that one of the best ways to get on with this program and accomplishing what it should is that we should have a resolution of those matters.

Frankly I don't view it as being entirely helpful that the agency has embarked upon another one-year delaying process in the form of this Task Force to prevent that resolution from occurring.

So to the extent that this body can address some of those foundational principles, I think it would be most helpful to the public. How

you do that with the pending lawsuit is up for you to decide, but that would be one recommendation I have.

Along those same lines, notwithstanding the agency's inability to adopt final rules that were proposed in 1994 and 1996, it's recently come to our attention that the agency is, nonetheless, going to embark upon another rulemaking proposal on Title V by the end of this year that they intend to finalize it in short order thereafter.

Clearly -- what explains this? Well, what explains it is the new rulemaking proposal that's coming out, a new round of industry flexibilities arising out of the White Paper #3 draft guidance document that the agency issued at the end of 2000 for comment, but has languished ever since, hopefully at least in my estimation because of the strong negative comment that greeted that document.

If the agency has time to issue White Paper #1 and White Paper #2 and draft White Paper #3 and proposed White Paper #3 rulemaking, surely it has the ability and the resources to finalize those revisions and have this end up in the courts where

that resolution that I mentioned earlier can occur.

I've already made a request to Bill Harnett that he place before this Task Force the issues that the agency intends to propose for comment in the white paper number 3 rulemaking. Without giving me a formal response he sounded open to that.

So that's something else I would encourage you to do and to consider whether it really makes sense to have a new rulemaking without those earlier rulemakings, which go to so many foundational principles, resolved yet.

The original Title V program in my view had three basic purposes. We've discussed them. But let me just give them my own labels since that's how I'll be structuring my remarks.

The first was a compilation purpose. Title V is supposed to compile applicable requirements into the same document structured after the Clean Air Act-NPDS permit program because the Air Act didn't have one.

Congress looked at the chaos of the SIP world and all the federal rules at the 80's and said,

you know, we really just need to provide a structured place to have one document where everyone knows what's going on.

That process has been long and frustrating. But ultimately I believe after the first round of permits are issued, we'll be far less resource-intensive and contentious in the future, because frankly the renewal permits and the renewal permit applications -- especially with the fact that you get a permit shield if you submit a renewal permit application -- it's not going to be nearly the amount of work it was in the first decade.

Certainly there will be new units on line and new requirements that have come into place. But I hope we can all agree that it's not nearly going to be as much work.

The second purpose is kind of a broad public participation purpose to the program. Dispersed throughout Title V are additional opportunities for public participation and the permit issuance process, the permit review process, the permit petition process, the permit appeal process.

I'm not going to do all those, although it is the view of the environmental petitioners that the agency did not meet its statutory obligations with respect to the permit revision process.

And you'll probably recall that was the source of all the controversy and media coverage in the '92 period surrounding the intervention of the competitiveness council.

I do just want to make one point since I think it's highly relevant to what you're discussing. The vast majority, overwhelming majority, of comments on permits, arguments about permits terms and the like come from the sources themselves.

At least let's be candid about that. The public comments on relatively few, exceedingly few -- in Dayton, Ohio, no permits.

But the negotiation process that occurs between source owners and permitting authorities is by far the most conversation that occurs between regulators and outside parties.

Now, the following remark is made in jest, but if you want to streamline the process, don't let

source owners comment on their permits. Obviously that's not going to happen. But if this body -- and it should not happen.

But if this body is going to consider ways in which public involvement is a potential impediment to the process and a resource drag and a burden and arguments over what terms should or should not be, let's just recognize that that's coming from the private sector side and not from the public.

I'm not contesting that right, but at least as a factual matter I think it's important to make that point.

The third aspect of the program, which I think is the greatest value added in my personal opinion, but also the area where the agency, EPA, and states have most thoroughly fallen down on the job, is what I call the compliance enhancement aspect of the program.

By that I refer to the actual procedural substantive requirements that Title V added to pre-existing permitting regimes and regulatory regimes, and those are enhanced monitoring, periodic

monitoring, compliance certifications, deviation reporting, semiannual reporting, and things of the like.

Congress decided, I think, correctly, that the clean air world, in particular, was woefully inadequate when it came to the actual ability of the public regulators and industry to determine whether they were in compliance or not. Again, they looked to the Clean Water Program and saw NPDS permitting and monitoring being much more rigorous, and, again, the underlying certification aspect of the program found their genesis in the Clean Water Program as well.

The most contentious aspects of the program, from the beginning, and the source of the greatest challenges and difficulties when I was at the Agency, dealt with these core aspects. In my opinion, industry, and, above all, industry lobbyists in Washington, never bought into those parts of the program and have systematically done what they could to undermine those aspects of the program.

I must say, unfortunately, EPA, under the

previous Administration, certainly continuing with this Administration, succumbed to that pressure. The Enhanced Monitoring Rule, which became the Compliance Assurance Monitoring Rule, fails to provide the public with knowledge or certainty that industry knows what its emissions are. To this date, permits do not have monitoring because the Agency delayed in the imposition of that monitoring until permit renewals, so a function of permits not being issued all across this country, ten years after the program -- 12 years after the program started, and six to eight years after the statute required that all permits be issued.

The function of EPA's decision not to require monitoring to permit renewals, is that we still do not have monitoring that was called for by the 1990 Clean Air Act. The Office of Management and Budget and Competitiveness Council intervened in 1991 and 1992 to ensure that periodic monitoring language was written into the regulations, but also failed to provide the public with any assurance that sources had monitoring sufficient to allow them to assure

compliance.

Then, most recently, and most scandalously, the Agency has backed away from what requirement was in the regulations themselves to provide sufficiency monitoring that would also provide the ability for the public to know if industry was accurately monitoring their emissions or not.

For those people on the panel who are not aware of that, that last action by the Agency is under challenge in the D.C. Circuit Court of Appeals in Washington right now. I won't comment on it any further.

In addition to really just woefully inadequate monitoring that doesn't legitimately allow any business around this table or anyone in the country to actually tell the public with confidence, whether they are in compliance or not, or, more to the point, whether they can accurately quantify their emissions or not, with the exception of probably the utility sector because of their continuous monitors and the like, and certain other industries that have

them.

Regulators or insiders like us, simply could not honestly tell people at a cocktail party that industry is able to accurately quantify their emission and knows what its emissions are. That situation is repeated on the compliance certification front, where there has been a relentless campaign from the beginning to ensure that industry didn't actually have to sign a document that said whether they were in compliance or not.

Part of that was struck down through the continuous or intermittent compliance portion of the court decision in the CAM case, but to this day, the most contested part of permits and the like, just comes down to the very basic fact of whether industry can tell the public whether they're complying with the law or not.

The situation is not much better, from I can tell, than it was before the intermittent monitoring rule was struck down by the D.C. Circuit. But for a program that held out the promise to the public that we would better be able to tell whether

people are in compliance or people know what their emissions are, I think it's very telling that those are the parts of the program that we have focused on so much in these regulatory fights in Washington, and it's not a very reassuring situation for the public to think that we spend so much energy trying to avoid those very basic and fundamental questions.

I want to touch on just a couple of other issues, to allow you to ask some questions and to have the other speakers touch on their remarks as well.

Actually, one of my pet peeves has already come up -- insignificant emissions units. The Agency chose the most derogatory semantic label that they possibly could have. There is no such thing as an insignificant emissions unit in the statute. The Clean Air Act doesn't mention it.

This was a label that the first Bush Administration came up with. The question is, is an emissions unit subject to a legal requirement under federal law, or is it not?

If it is, it should be in the permit, and

the public should have the same right to understand whether it is complying with the law and being subject to monitoring and compliance for certification as anything else. The fact that we call it an insignificant emissions unit is just nothing more than a derogatory label.

As Keri has pointed out already, these things can add up. I would encourage you to get past labels and to look to see whether it's with the basic purpose and framework of Title V to require emissions unit, subject to federal law, to be subject to the permit program.

The last time I checked, it's the current policy, the legal position and policy of EPA, that units do have to be included in the permit, if they are subject to applicable requirements.

Now, I'm all in favor of sensible streamlining. The thing that troubles me most about the program, both when I was at EPA in talking to John Paul and others, is the unnecessary resource and time and burden associated with the program.

That does not benefit the public. I'd

rather have regulators focused on air quality objectives as well. But the truth be told, I still fundamentally believe that a lot of delay comes up through the source interactions.

More to the point, some permits are just written poorly and need not take that much time, or need not be written at the length that they are. The Agency has tried to address that through streamlining guidance and the like in the past.

Since this permit also came out, the Air Force permit that was mentioned earlier, I actually looked into this because I was curious about it. The one for Wright-Patterson Air Force Base that was mentioned as being 634 pages long, actually the permit is 295 pages long. The additional 334 pages associated with the permit comes from an attachment, which is 40 CFR Part 63, Subpart (MMM), both the preamble and the rule in the Federal Register.

That's certainly not necessary to add to a permit, and it cuts the permit in half right there. Of the 295 pages of the permit itself, I counted 30 blank pages that are in there inexplicably, and there

is a great deal of boilerplate that is found in all permits.

The State of Ohio, for reasons that aren't clear to me, also chooses to write out federal requirements, word-for-word, in the permit. There's no need to do that. You don't have to write the NESHAP into the permit. That adds tremendous length to a permit.

You can incorporate those things by reference. The truth is, if someone wants to find out what the requirements are, they're either going to have to look in 40 CFR Part 63, or you can look into the permit, but you can't blame Title V, because EPA wrote Subpart A or Subpart DD to be as long as it is.

That's just a fact of life. Maybe it does make sense to have a 300-page permit with all of the NESHAP there, so you don't have to go to a library somewhere on the site to do it, to look up the subpart. I think that kind of makes sense.

But I don't think you can really turn around and criticize the permit for being 300 pages

long. Anyway, I thought Keri's points were also very well taken.

Streamlining recommendations from this group would be welcomed. I think there are sensible things that can be done, so long as we don't lose the legal requirements or we don't try to pull any fast ones, which I personally think White Paper 1 and White Paper 2 do, in order to eliminate requirements.

As one of the speakers, Ms. Owen, referred to already, I think it's questionable, whether those legal requirements actually do evaporate through some of the White Paper's guidance. But putting that aside, I think there's always sensible streamlining that can occur.

I want to just quickly touch on one subject that came up, and that is the question of funding. This is actually something I dealt with a lot when I was at the Agency.

There are a lot of dirty little secrets about Title V funding and they are part of the history here. One is that state legislatures, almost from the beginning, placed artificial caps on the

amount of permit fees that could be charged, without regard to any knowledge of how many resources it was going to take to issue permits.

Another phenomenon that occurred is that in the mid-'90s, there was a wave of elections of conservative governors who slashed permitting staffs across the country, and in Michigan, being a notorious example, with the effect that, guess what? They weren't able to issue the permits.

Congress imposed an artificial, arbitrary, statutory deadline for permit issuance. We are all stuck with that. EPA didn't meet it anywhere, so the blame, as is often the case, lies with Congress, but EPA was given a mandate and states were given a mandate to issue permits under a certain schedule.

The fact is, they allowed permit fees and funding to be instituted in programs that were not adequate to do the job.

I have great sympathy for John Paul, and I think he's taken a responsible position as a manager for doing the best that he can with the resources that he has. But if you want to look at whether the

program is working in a timely fashion, look at the funding mechanisms. It's supposed to be self-funded, another little dirty secret.

My favorite part of the program is that there are actually states out there that are stealing Title V money and putting into the general treasury fund. There are at least five or six that I remember, and who knows how many are going on now.

One recommendation would be to do an audit of these programs. It is illegal for these states to take money from the Title V self-funding mechanism and put it into the general treasury, which I'm sure is very tempting, but doesn't help the program a lot, and it's something that EPA can easily uncover, and they have in the past.

They should be doing audits in the future. I think I'll stop there. I could probably go on. I've got some other personal pet peeves, anti-credible evidence language that's cropped up in permits, which fit in which my third thesis about the compliance enhancement portions of the program.

But, in the name of taking questions, I'll

just stop right here. Thank you.

MR. LING: Thank you very much, John. Questions for John? Bernie was first, I think, although it was close.

MR. PAUL: I'd like to get a clarification from you on one of your statements. You seemed to be supportive, initially, of the approach of incorporating complex regulatory requirements into the permit, by reference. But you followed that with statements that it would be helpful to have all those requirements in the permit. What's your final view of how complex rules should be incorporated into the permit?

MR. WALKE: I should have been more refined in my response, because the statutory language actually guides us on this. I believe it's Section 504(a) of the statute that requires assurance of compliance with all applicable requirements, including emissions limitations, monitoring, or something or other. I'm not quoting it accurately, of course, but I think the statute requires those core requirements, such as emissions limitations and